Supreme Court, U.S.
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Nos. 93-671 and 93-681

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOSEPH J. SANTOPIETRO AND PERRY A. PISCIOTTI,
PETITIONERS

v.

UNITED STATES OF AMERICA

PAUL R. VITARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was authorized to depart upward, pursuant to Sentencing Guidelines § 2C1.1, Application Note 5, from the Guidelines sentence for petitioners Santopietro and Pisciotti based on the fact that their offenses involved a "systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government."

2. Whether the district court correctly enhanced the sentences of petitioners Santopietro and Pisciotti for obstruction of justice pursuant to Sentencing Guidelines § 3C1.1.

3. Whether petitioner Pisciotti was denied his Sixth Amendment right to effective assistance of counsel because the attorney who represented him during the government's investigation and through the first four days of trial had a conflict of interest.

4. Whether law enforcement agents who testified at petitioners' trial improperly commented on petitioners' guilt and invaded the province of the jury.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (93-671 Pet. App. 1a-10a) is reported at 996 F.2d 17.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1993. A petition for rehearing was denied on July 29, 1993. 93-671 Pet. App. 11a-12a. The petition for a writ of certiorari in No. 93-671 was filed on October 26, 1993. The petition for a writ of certiorari in No. 93-681 was filed on October 29, 1993, and thus is out of time under this Court's Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, the three petitioners were convicted of conspiring to commit bribery, in violation of 18 U.S.C. 371. Petitioner Santopietro also was convicted on five counts of receiving corrupt payments, in violation of 18 U.S.C. 666(a)(1)(B); two counts of bank fraud, in violation of 18 U.S.C. 1344; six counts of embezzlement of federal grant funds, in violation of 18 U.S.C. 665(a); and two counts of tax evasion, in violation of 26 U.S.C. 7201. Petitioner Pisciotti also was convicted on three counts of giving corrupt payments, in violation of 18 U.S.C. 666(a)(2), and one count of bank fraud, in violation of 18 U.S.C. 1344. Petitioner Vitarelli also was convicted on one count of receiving corrupt payments, in violation of 18 U.S.C. 666(a)(1)(B), and one count of making a false statement on his tax return, in violation of 26 U.S.C. 7206(1). Santopietro was sentenced to 108 months' imprisonment, to be followed by three years' supervised release. Pisciotti was sentenced to 114 months' imprisonment, to be followed by three years' super-

vised release. Vitarelli was sentenced to 41 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. 93-671 Pet. App. 1a-10a.

1. Petitioner Santopietro became mayor of the city of Waterbury, Connecticut, in November 1985, and was twice reelected. Over the next five years, he conspired with petitioner Pisciotti (former Town Chairman and Republican State Central Committee member), petitioner Vitarelli (president of the city's Board of Aldermen), other government officials,[1] and a group of bankers and land developers to trade favorable city action on certain development projects in return for payments disguised as loans, sales of options, contract cancellations, and property leases. 93-671 Pet. App. 3a; Gov't C.A. Br. 2-19. Beginning shortly after Santopietro's 1985 election and continuing until approximately 1990, the conspirators collected at least $710,000 from the group of developers. *Id.* at 2-3. Santopietro also used federal grant funds administered by Waterbury's Department of Employment, Education and Grants Administration for personal travel and entertainment. *Id.* at 19-20.

2. FBI agent Michael Clark was one of approximately 35 witnesses who testified at petitioners' trial, which lasted more than five weeks. Clark was called to identify certain documents, to describe the details of a series of complex financial and real estate transactions using the documents, and to describe the execution of search warrants and interviews of certain witnesses.

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[1] Robert Giacomi (the Board of Aldermen's majority leader), Fred Giusti (an alderman and city employee), and Jack Giacomi (the City Negotiator beginning in 1987) were also convicted on a variety of charges including conspiracy.

On cross-examination, all three petitioners repeatedly questioned Clark about his views on the legality of the transactions he had described during his direct examination. Gov't C.A. Br. 24-29. For example, Pisciotti's counsel asked: "Now, you don't like any of these transactions. That's been your testimony, correct?" Agent Clark answered: "I feel that there's bank fraud, money laundering and corrupt payments in several of these transactions." *Id.* at 27. Santopietro and Pisciotti objected to the answer, and Santopietro moved to strike the answer. The court denied the motion, ruling that counsel had opened the door to Clark's answer; the court suggested that counsel not ask such questions. Feb. 28, 1992, Tr. 145-146. When Santopietro later asked the court to reconsider its ruling on the ground that the agent had given his opinion that crimes had been committed, the court agreed to reconsider the issue and invited suggestions for a cautionary instruction. Santopietro then in effect withdrew his motion to strike, stating that he would prefer the cautionary instruction rather than striking the testimony. *Id.* at 249-252. At the beginning of the next day of trial, the court gave the jury a cautionary instruction before Agent Clark retook the stand. Gov't C.A. Br. 31.

On redirect examination, the prosecutor asked Agent Clark to define the term "money laundering," which Clark had used during cross-examination. 93-681 Pet. 8. Santopietro objected on the ground that the definition was "something that [the court] will instruct the jury on." *Ibid.* The judge overruled the objection, and Clark described money laundering as the use of a "financial transaction" to "disguise either where the money came from or where the money ends

up." *Id.* at 9. No defendant was charged with money laundering.

The prosecutor also asked Agent Clark to define the term "corrupt payments," a term that he had used during cross-examination. There was no objection to that question. 93-671 Pet. 26; 93-681 Pet. 9. Agent Clark described "corrupt payments" as "anything of value" and stated that the term "comes from the statute which is Title 18, U.S. Code 666." 93-671 Pet. 26-27; 93-681 Pet. 9. There was no motion to strike the answer. When the prosecutor posed her next question about whether the statute distinguished between loans and gifts and other payments, defense counsel objected, and the objection was sustained. Mar. 3, 1992, Tr. 12-13.

On recross-examination of Clark, Santopietro exploited the cautionary instruction the court had given about Clark's testimony. Santopietro repeatedly emphasized through his recross-examination that it was up to the jury, not Clark, to decide whether certain crimes had been committed in this case. Mar. 3, 1992, Tr. 21-23.

IRS agent Daniel Mancinone also testified as a government witness at petitioners' trial. The government had Mancinone introduce several documents, including the tax returns of various defendants. During cross-examination, Vitarelli and two co-defendants attempted to introduce into evidence amended tax returns for the year 1988 that had been filed in 1991. Gov't C.A. Br. 35-36. The district court refused to admit the amended returns, but Vitarelli's counsel elicited from Mancinone on cross-examination, over government objection, testimony that the amended returns had been filed and that Vitarelli owed no tax as of the date of trial. *Id.* at 36. On redirect exami-

nation, the district court overruled petitioners' objection and permitted Mancinone to answer the question, "[t]o the best of your knowledge * * * is the filing of an amended tax return a defense to a charge of subscribing to a false tax return?" Mancinone answered in the negative. *Ibid.*; 93-681 Pet. 10-11.

3. At sentencing, after calculating Pisciotti's and Santopietro's base offense levels, the district court added a two-level enhancement based on its finding that the two of them had obstructed justice within the meaning of Sentencing Guidelines § 3C1.1. The court found that Santopietro had obstructed justice during the execution of a search warrant at his office in March 1991. Gov't C.A. Br. 102. When officers arrived to execute the warrant, Santopietro had co-defendant Jack Giacomi smuggle Santopietro's briefcase out of the building. The FBI learned of the action and retrieved the briefcase, which was found to contain documents incriminating Santopietro. *Id.* at 21.

The court found that Pisciotti obstructed justice by attempting to influence his sister's trial testimony. Gov't C.A. Br. 104. In support of that finding, the district court relied on hearsay testimony at the sentencing hearing from Agent Clark. Clark testified that an employee of the U.S. Attorney's office had overheard Pisciotti in the courthouse coffee shop telling his sister to testify that she did not remember or was confused in response to certain questions. June 23, 1992, Tr. 11-12. Because the employee did not wish to be publicly identified, the government gave the employee's name to the court in camera. *Id.* at 12-13. The court found corroboration for Clark's testimony in the grand jury and trial testimony of Pisciotti's sister. *Id.* at 37; Gov't C.A. Br. 105. The

court found the hearsay sufficiently reliable to support an enhancement for obstruction of justice. June 23, 1992, Tr. 37.

4. After the court applied the obstruction of justice enhancements to Santopietro and Pisciotti, it determined the adjusted offense levels and the Guidelines sentencing range. The court then departed upward from the Guidelines range for Santopietro and Pisciotti pursuant to Sentencing Guidelines § 2C1.1, Application Note 5, and Guidelines § 5K2.7. Section 2C1.1 provides the offense level for bribery offenses. Application Note 5 to Section 2C1.1 provides:

> Where the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).

The referenced Chapter Five, Part K of the Sentencing Guidelines consists of several policy statements that discuss grounds for departures from Guidelines sentences. In particular, Section 5K2.7 pertains to upward departures where government functions have been disrupted. It provides:

> If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function

> is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

In regard to Santopietro, the district court concluded that his "extensive criminal conduct as found by the jury involving embezzlement, bank fraud and tax evasion in addition to bribery, resulted in * * * 'pervasive corruption of a governmental function, process and office' cited in Application Note 5." Gov't C.A. Br. 89. The court found that Santopietro "sent the message that for the right price [his] office was for sale, and it was for sale early on. All with an arrogance, at least as the evidence came forward, * * * that made a mockery of the faith that the electorate had placed in you, and placed in you more than one time." *Id.* at 95. The court also specifically found that "[t]he city's confidence in elected officials and any notion of sanctity in a vote cast, has been for all practical purposes shattered." *Ibid.*

In regard to Pisciotti, the court explained that

> [t]he conspiracy we heard about over five weeks of trial was not about a single act of indiscretion. It was about an overwhelming scheme to take advantage at every turn of the collusional [*sic*] * * * of Joseph Santopietro's and Richard Barbieri's obsessions with power in their respected areas. Even before the mayor had taken his oath of office, as I understand the facts, you and Mr. Barbieri were meeting or had a meeting to lay the ground work for the conspiracy charged in the indictment. Your role then as an elder statesman, Mr. Pisciotti, was in the final analysis a corrupting one rather than an enlightening one.

> The net affect [*sic*] of these plans was, as I have said, the very systematic and pervasive corruption of a governmental function, process or office contemplated in Application Note 5. Corruption that surely caused a los[s] of public confidence in government.

Gov't C.A. Br. 95-96.

5. The court of appeals affirmed. 93-671 Pet. App. 1a-10a. In its published opinion, the court addressed certain sentencing arguments raised by petitioners' co-defendants. The court summarily affirmed the judgments against petitioners, stating that it had "carefully considered" their "numerous issues on appeal" and "concluded that none of them has any merit." *Id.* at 5a.

ARGUMENT

1. Santopietro and Pisciotti contend (93-671 Pet. 10-16) that the district court erred when it departed upward from the Guidelines sentencing range pursuant to Sentencing Guidelines § 2C1.1, Application Note 5, and Guidelines § 5K2.7. Petitioners argue that the district court's reliance on Section 2C1.1, Application Note 5, runs afoul of Section 5K2.7. An upward departure under Section 2C1.1, Application Note 5, however, is not precluded by Section 5K2.7, and the departure in this case was not inconsistent with the policy articulated in Section 5K2.7.

Section 5K2.7 authorizes an upward departure in cases in which a governmental function is significantly disrupted. It specifies that such a departure is generally not appropriate, however, where such disruption is inherent in the offense, *i.e.*, in cases involving offenses such as bribery or obstruction of

justice. It nonetheless authorizes an upward departure even in those cases, if the court finds "unusual" circumstances. See, *e.g.*, *United States* v. *Sarault*, 975 F.2d 17, 19 (1st Cir. 1992) (departure appropriate under Section 5K2.7 even when disruption of governmental function is inherent in the offense if "disruption was so atypically great as to exceed the level of interference inherent in the offense"); *United States* v. *Garcia*, 900 F.2d 45, 49 (5th Cir. 1990) (departure appropriate under Section 5K2.7 even when disruption of government function is inherent in the offense if "unusual circumstances" exist).

Section 2C1.1, Application Note 5, authorizes an upward departure where the defendant's conduct was part of a pattern of "systematic or pervasive corruption," where it involved corruption of a governmental "function, process, or office," and where the corruption is such that it "may cause loss of public confidence in government."

Petitioners' case was one in which the evidence showed more than mere disruption of a governmental function. The corruption that was proved at trial permeated the Waterbury government, involved the Mayor's office and the Board of Aldermen, and affected numerous municipal decisions and transactions. Moreover, the district court found that this case "surely caused a los[s] of public confidence in government," Gov't C.A. Br. 96, and that "[t]he city's confidence in elected officials and any notion of sanctity in a vote cast, has been for all practical purposes shattered." *Id.* at 95. The upward departure in this unusual case was thus warranted by Section 2C1.1,

Application Note 5, and did not contravene Section 5K2.7.[2]

2. Santopietro and Pisciotti also challenge (93-671 Pet. 16-20) the district court's application of an enhancement to their offense levels under Sentencing Guidelines § 3C1.1, based on obstruction of justice.

Section 3C1.1 directs a sentencing court to increase a defendant's offense level by two levels if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." Application Note 3 to Section 3C1.1 provides a non-exhaustive list of the types of conduct that fall within that Guideline: it includes "unlawfully influencing" a witness, "suborning, or attempting to suborn perjury," and "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding." Application Note 3(d) explains that "if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender."

The district court correctly applied the Section 3C1.1 enhancement to Santopietro based on Santo-

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[2] Santopietro and Pisciotti also contend (93-671 Pet. 15-16) that the district court failed to explain the extent of its departure. The extent of the upward departure, however, is amply supported by the court's discussion of the magnitude of the offense.

pietro's conduct in arranging for his briefcase to be smuggled out of his office when the FBI agents were executing a warrant to search that office in March 1991. There is no merit to Santopietro's contention (93-671 Pet. 17-19) that he falls within the exception in Application Note 3(d) for conduct that occurs contemporaneously with arrest, because, as he concedes (*id.* at 17), he was not arrested in March 1991 when he had the briefcase smuggled out. Moreover, as the Eighth Circuit recently held, the exception in Application Note 3(d) includes "only conduct admitting a spontaneous or visceral or reflexive response occurring at the point arrest becomes imminent," and not "cool and deliberate actions" by a defendant. *United States* v. *Lamere*, 980 F.2d 506, 515 n.6 (8th Cir. 1992); see also *United States* v. *Stout*, 936 F.2d 433, 435 (9th Cir. 1991) (attempting to flush counterfeit bill down toilet at police station after arrest for counterfeiting is not an "act of panic"). Santopietro's attempt to conceal the contents of his briefcase from the investigators is not the kind of spontaneous effort to destroy evidence that falls within the exception in Application Note 3(d).

The district court correctly applied the obstruction of justice enhancement to Pisciotti based on its finding that he attempted to influence his sister's testimony during a conversation he had with her in the courthouse coffee shop just prior to her testimony. Pisciotti argues (93-671 Pet. 19-20) that the district court erred because the court relied on hearsay evidence to make that finding and because the government did not disclose the identity of the hearsay declarant.

The Guidelines explicitly provide that "[r]eliable hearsay may be considered" in sentencing a defendant. Sentencing Guidelines § 6A1.3, Commentary; see *United States* v. *Ushery*, 968 F.2d 575, 583 (6th Cir.), cert. denied, 113 S. Ct. 392 (1992); *United States* v. *Montoya*, 967 F.2d 1, 2-3 (1st Cir.), cert. denied, 113 S. Ct. 507 (1992); *United States* v. *Griffin*, 945 F.2d 378, 381 (11th Cir. 1991), cert. denied, 112 S. Ct. 1958 (1992). Moreover, the Guidelines authorize nondisclosure of the identity of an informant who provided hearsay evidence if there is "good cause for the nondisclosure" and "there is sufficient corroboration by other means." Sentencing Guidelines § 6A1.3, Commentary.

The district court correctly found that the information provided by Agent Clark at Pisciotti's sentencing proceeding was reliable. There is nothing in the record to suggest that the government employee who relayed the information to Clark had any connection to the case or had any reason to fabricate the information. Pisciotti's case is not one in which the informant was wholly anonymous. The identity of the informant was disclosed to the court and significant descriptive information was disclosed to Pisciotti. Pisciotti was provided not only with facts about the informant's employment that made independent identification likely, but also with facts regarding the interaction between the informant and Pisciotti's sister indicating that the sister could identify the informant. See June 23, 1992, Tr. 12. Moreover, there was sufficient corroboration for the hearsay testimony through other means, including the trial and grand jury testimony of the sister. Accordingly, the district court did not err in finding that Pisciotti attempted

to influence his sister's testimony and in enhancing his sentence under Section 3C1.1 based on that finding.

3. Pisciotti argues (93-671 Pet. 20-25) that he was denied his Sixth Amendment right to effective assistance of counsel because the attorney who represented him during the government's investigation and the first four days of trial had a conflict of interest.

Throughout the government's investigation and the first four days of trial, Pisciotti was represented by attorney Paul Yamin. Prior to trial, Yamin had accompanied Pisciotti's sister when she appeared before the grand jury where she was asked to testify regarding one of the transactions later charged in the indictment. She read a statement to the grand jury that had been prepared by Yamin. Gov't C.A. Br. 59-61. That grand jury testimony and the relationship between Pisciotti, his sister, and Yamin were alluded to during Pisciotti's sentencing.

During argument about the obstruction of justice enhancement, the prosecutor stated that she believed Pisciotti's attempt to influence his sister's testimony actually had begun "between the time that she spoke to the agents at her home and the time when she appeared at the Grand Jury with Mr. Pisciotti's lawyer and a statement that Mr. Pisciotti's lawyer had written for her to tell her what the version of the events was." 93-671 Pet. 21. The prosecutor also stated that prior to acquiring evidence of Pisciotti's involvement, "it would not have been fair to tax Mr. Pisciotti himself with what we believed at the time of the Grand Jury was primarily the actions of his lawyer." *Id.* at 22. Pisciotti interprets that statement to mean that "at the time of trial, the government believed that Yamin had been involved in obstructing

justice with respect to the very allegations against which he was defending Pisciotti," 93-671 Pet. 22, and he asserts that Yamin was therefore laboring under a conflict of interest in representing him.

Regardless of the substance of Pisciotti's ineffective assistance claim, it is not ripe for review at this juncture. Claims of ineffective assistance of counsel ordinarily should be raised in the first instance in a motion under 28 U.S.C. 2255 rather than on direct appeal. See, *e.g.*, *United States* v. *Navejar*, 963 F.2d 732, 735 (5th Cir. 1992); *United States* v. *McGill*, 952 F.2d 16, 19 (1st Cir. 1991). Ineffective assistance of counsel claims are ordinarily ill-suited to resolution on direct appeal, because they typically require consideration of matters that are outside the direct appeal record. Pisciotti did not raise his ineffectiveness claim in the district court, and the district court thus did not have an opportunity to develop a record on the issue. Accordingly, Pisciotti's claim that his counsel was disabled by a conflict of interest is not properly presented for review at this time.

On the merits, Pisciotti's claim rests solely on the prosecutor's implication at sentencing that "at the time of the Grand Jury," the government believed that Pisciotti's attorney had been attempting to shape the testimony of Pisciotti's sister. 93-671 Pet. 22. Pisciotti did not introduce any evidence of any actual investigation of the attorney by the government or any evidence that the attorney had actually engaged in any misconduct. Nor did Pisciotti allege or establish in the district court any specific prejudice he suffered from the alleged conflict of

interest—proof that would be difficult to muster in any event, inasmuch as the attorney was dismissed after the first four days of trial.

4. Santopietro and Pisciotti contend that the court erred in permitting Agent Clark to testify in statutory language in characterizing their conduct. Specifically, they complain that the district court should not have permitted Agent Clark to testify that the term "corrupt payments" was "shorthand for anything of value" and that the term came from 18 U.S.C. 666. 93-671 Pet. 26-27. They contend that Clark thereby conveyed his conclusion that petitioners had violated 18 U.S.C. 666 and implicitly bolstered the credibility of other government witnesses. They also contend that Clark's testimony about "money laundering" and "corrupt payments" improperly bolstered the government's case. 93-671 Pet. 27-29. Vitarelli makes the related claim that the district court should have excluded opinion testimony by Agents Clark and Mancinone that invaded the province of the jury. 93-681 Pet. 22-32.

Contrary to petitioners' contention (93-671 Pet. 26), Agent Clark's testimony on redirect examination about the meaning of the term "corrupt payments" and his reference to 18 U.S.C. 666 were not objected to, nor did any defendant move to strike his testimony on that subject. Mar. 3, 1992, Tr. 12. The court sustained an objection to the next question the prosecutor posed about the specifics of Section 666, and Agent Clark did not answer it. *Ibid.* In fact, even petitioners' objection to Clark's initial use of the term "corrupt payments" during cross-examination was withdrawn in light of the district

court's cautionary instruction about Clark's testimony.[3]

Because there was no objection, the challenge to the "corrupt payments" testimony is reviewable only for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993). But the admission of that testimony does not even remotely rise to that level. First, petitioners opened the door to testimony about the legality of their conduct by repeatedly asking Agent Clark for his opinion on the legality of various transactions and his understanding of the applicable law. In fact, Agent Clark's initial use of the term "corrupt payments" was in response to questions on cross-examination. Petitioners therefore cannot complain about the government's request on redirect examination that Agent Clark define the terms he had used on cross-examination. See *United States* v. *Prince*, 883 F.2d 953, 961-962 (11th Cir. 1989); *United States* v. *Vachon*, 869 F.2d 653, 658-659 (1st Cir. 1989); *United States* v. *Nersesian*, 824 F.2d 1294, 1308-1309 (2d Cir.), certs. denied, 484 U.S. 957, 958 (1987) and 484 U.S. 1061 (1988); *United States* v. *Chavis*, 772 F.2d 100, 107 (5th Cir. 1985).[4]

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[3] Petitioner Vitarelli concedes that he is not challenging Clark's initial testimony about "corrupt payments" on cross-examination. 93-681 Pet. 7-8.

[4] Although petitioners refer to Agent Clark's testimony about the meaning of the term "money laundering," to which there was an objection, they could not have been prejudiced by that testimony, because none of them was charged with money laundering. It is also far from clear that petitioners preserved their objection to Agent Clark's definition of money laundering. Santopietro objected to that testimony only on the ground that "[t]his is something that [the court] will

In any event, Agent Clark's testimony that the term "corrupt payments" comes from 18 U.S.C. 666 did not constitute an opinion about petitioners' guilt. And the cautionary instruction that the court gave undermined any potential prejudice by instructing the jurors that "as the finders of the facts you, the jurors, will of course ultimately decide such matters." Gov't C.A. Br. 32. See *United States* v. *Johnson*, 319 U.S. 503, 519-520 (1943) (expert witness testimony about income and expenditures of defendant did not invade province of jury in light of judge's charge, which left "jury free to exercise its untrammeled judgment upon the worth and weight of testimony"). Moreover, after the instruction was given and after Clark's testimony about "corrupt payments" on redirect examination, Santopietro revisited the issue on recross-examination. He emphasized the cautionary instruction about Clark's opinion with respect to certain crimes and the fact that it was up to the jury, not the FBI, to determine whether the defendants were guilty. Mar. 3, 1992, Tr. 21-23.

There is also no merit to Vitarelli's claim that Agent Mancinone improperly invaded the jury's province by testifying that to the best of his knowledge the filing of an amended tax return is not a defense to the offense of subscribing to a false tax return. 93-681 Pet. 10. Mancinone's testimony was in direct response to Vitarelli's cross-examination, in which he elicited testimony that he and some of the other defendants had filed amended tax returns and

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instruct the jury on"; none of the defendants objected on the ground that the agent's testimony amounted to an opinion on the defendants' guilt. 93-681 Pet. 8-9.

that Vitarelli owed no tax as of the date of trial. The cross-examination incorrectly suggested that the filing of the amended returns absolved Vitarelli of any liability for filing falsified tax returns. The government was entitled to bring out testimony to rebut that inference. See *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1543-1544 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990). In addition, the prosecutor's question was posed to the agent in terms of the agent's knowledge and did not offer the agent's testimony as an absolute statement of the law. See *United States* v. *Fogg*, 652 F.2d 551, 556-557 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982).

More significantly, Agent Mancinone's testimony was consistent with the district court's instruction to the jury that "the mere filing of an amended return will not serve as a defense to this charge [of filing a false return]." Gov't C.A. Br. 37. Vitarelli could not have been prejudiced by testimony from an IRS agent who provided the same information that the jury later learned directly from the district court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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